United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1048

To be argued by
THOMAS E. ENGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1048

UNITED STATES OF AMERICA,

Appellee,

—v.—

EARL FODDRELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
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Preliminary Statement

Earl Foddrell appeals from a judgment of conviction entered on January 30, 1975 in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 73 Cr. 869, filed on September 19, 1973, charged Foddrell, co-defendants Jule Byrd and Lonnie Thomas, a/k/a "Lonnie Youngblood", co-conspirator Theodis Williams and other unnamed co-conspirators in Count One with conspiracy to violate the federal narcotics laws from January 1, 1972 to September 19, 1973, the date of the filing of the indictment, in violation of Section 846 of

Title 21 of the United States Code.* Count Two charged Foddrell, Byrd, and Thomas with the sale of an approximate one-eighth of a kilogram of heroin on June 13, 1972 in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Trial commenced on November 20, 1974 and concluded on November 26, 1974 as to the defendants Foddrell and Byrd when the jury found them guilty on both counts. The jury was discharged on November 27, 1974 when it could not agree on a verdict as to the defendant Thomas, and a mistrial was declared.**

On January 30, 1975, Judge Gagliardi sentenced Foddrell to a term of ten years imprisonment, to be served concurrently with a term of eleven years imposed in *United States* v. *Barmore, et al.*, 73 Cr. 229, and with credit for the time already served pursuant to the judgment therein, to be followed by a special parole term of six years.***

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* Count One was dismissed on April 25, 1974 with the consent of the Government on double jeopardy grounds by the Honorable Charles H. Tenney, United States District Judge, the judge to whom the instant case was then assigned. In the same opinion Judge Tenney denied the motion of the defendants Foddrell and Thomas for a dismissal of Count Two on the grounds of pre-indictment delay. *See infra* at 17-19.

** The defendant Thomas was acquitted on January 29, 1975 at his retrial.

*** Foddrell petitioned the District Court for an order (1) vacating the judgment entered in 73 Cr. 229 and (2) permitting the withdrawal of his plea on the ground that he was not sufficiently aware of the consequences of his plea. By memorandum decision dated April 17, 1975 Judge Gagliardi granted Foddrell's motion to withdraw his plea of guilty and permitted him to replead to Indictment 73 Cr. 229. The Court held that the record of the plea did not establish that Foddrell understood that a special parole term would be imposed and that this Court's pronouncements in *Michel* v. *United States*, 507 F.2d 461 (2d Cir. 1974) and *Ferguson* v. *United States*, Dkt. No. 74-2659 (2d Cir. April 11, 1975) slip op. at 2821 required that the plea be vacated.

Statement of Facts

The Government's Case

On June 13, 1972, Special Agent Garfield Hammonds, an undercover agent of the Drug Enforcement Administration, accompanied by an informant named John Taylor, drove to the street corner of 119th Street and Eighth Avenue in Manhattan, arriving just after five o'clock in the afternoon (Tr. 100-103, 403-04, 445).* Shortly after their arrival, Agent Hammonds was joined inside Freddie's Bar by Theodis Williams, and they discussed the purchase of one-eighth of a kilogram of heroin (Tr. 103-04, 201, 280-83).**

Hammonds, Williams and the informant walked outside the bar to a position in front of the Gold Medal Supermarket and waited for Williams' source. At about six o'clock Foddrell and Byrd drove up in a 1948 Kaiser automobile (Tr. 105-06, 284, 290, 339). Foddrell got out of the car with Byrd and approached Williams who told them that Hammonds was from Georgia and wanted to buy an eighth-kilogram of heroin. Minutes later Foddrell told Hammonds that he could supply him with the eighth of a kilogram because he had just received nine kilograms of high quality from a recently docked ship and that the price was $3,600 (Tr. 108). Foddrell also told Hammonds that he would have to "front" the money, and Williams assured Hammonds that Foddrell's reputation in the Harlem narcotics world was that he was fair and trustworthy. Williams said that both he and Foddrell had legitimate business in-

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* "Tr." refers to the trial transcript; "H." refers to the transcript of pre-trial hearings; "C." refers to the transcript of the pre-trial conference of November 18, 1974; "GX" refers to Government's exhibits; "CX" refers to Court's exhibits; "Br." refers to appellant's Brief; "A." refers to appellant's Appendix.

** Theodis Williams testified for the Government at trial.

terests in Harlem which assured that they would not run out on him (Tr. 109-11). Shortly thereafter, another man came out of the supermarket and told Foddrell that $13,000 had still not been paid on a one-half kilogram heroin transaction which had occurred that morning. Foddrell then told Hammonds that he should not be concerned about his "little small chunk of $3,600" when he (Foddrell) still had to be paid $13,000 for the earlier transaction (Tr. 113, 288-89).

Foddrell and Byrd then drove off and returned in 15 or 20 minutes (Tr. 113-14, 291). Foddrell asked Hammonds and Williams if they were ready, and Hammonds began to count $3,600. Williams told him not to count money on the street, and Hammonds got into a Buick Electra parked in front of the supermarket to count the money. He then handed the $3,600 to Williams while they stood outside, and Williams walked into the supermarket with Foddrell and Byrd (Tr. 114-16, 205, 298-99, 352).

Williams handed Foddrell the money inside the store and Foddrell began to count it as he walked outside (Tr. 118, 299-300). Foddrell then told Hammonds that he would return in 15 or 20 minutes and left with Byrd in the same car. After waiting approximately 40 minutes for Byrd and Foddrell to return, Hammonds and Williams drove to the B & E Kitchen located at 135th Street and 8th Avenue, a restaurant which Foddrell operated and in which Byrd had been seen behind the counter. The automobile that Byrd and Foddrell had driven earlier in the evening was parked outside the restaurant (Tr. 111, 118-19, 301-02, 346-47, 357, 396-97). Agent Hammonds and Williams returned to the street corner at 119th Street and 8th Avenue where the informant told them that nobody had shown up in their absence (Tr. 119, 302-03, 385-86).

Moments later Byrd arrived in a taxicab and gave Williams a message from Foddrell. Williams, in turn, told Hammonds that Byrd and Foddrell had been followed by

an unmarked police car and that they had to change two or three cars in order to lose the police. Byrd also said that they should not panic and that the package would arrive (Tr. 119, 148, 267-68, 303-04, 355-56).

Twenty or thirty minutes later, Foddrell drove up in a Buick Electra and entered Freddie's Bar. Williams followed him inside, and Foddrell told him to go to the bathroom. Williams went to the bathroom, the defendant Thomas handed him the package of heroin, which Williams stuffed inside his belt under his shirt. Williams left the bathroom and walked out of the bar joining Hammonds across the street (Tr. 120, 304-07, 376-383, 385-87). Williams told Hammonds that he had received the heroin and told him to meet him at the Malibu Lounge, a bar in which Williams had an interest, on 8th Avenue between 138th and 139th Streets (Tr. 120, 171-72, 211, 223-24, 308, 383).

Hammonds followed Williams to the Malibu where Williams handed the narcotics to a barmaid who put the package in her purse on the top of the bar. Williams removed the narcotics from the purse and handed the package to Hammonds who was sitting at the bar. Hammonds, Williams and the informant then went to the bathroom to inspect the narcotics. (GX 1C; Tr. 121-24, 175-84, 308-310, 384-85). Agent Hammonds thereafter left the Malibu, brought the narcotics to his headquarters where it was sealed and placed in a vault, and delivered it to a Drug Enforcement Administration chemist the following day (GX 1C; Tr. 123). The narcotics weighed 140.3 grams of which 33.8 percent was heroin hydrochloride, the remainder being lactose and mannitol, common cutting agents for heroin (GX 1C; Tr. 249-50).

On September 20, 1973 Agent Hammonds arrested Foddrell for the narcotics sale of June 13, 1972. After warning Foddrell of his rights, Hammonds told Foddrell that he had been arrested for selling him "that eighth of a kilogram".

Foddrell admitted remembering Hammonds but said he still could not understand why he was arrested because he only took the money and did not give Hammonds the package (Tr. 145, 215).

Later the same day, at an interview conducted by Assistant United States Attorney Eugene F. Bannigan and witnessed by Special Agent Phillip Hayward, Foddrell again stated, after being warned of his rights, that he remembered receiving the money, but did not know why he was arrested because he did not handle the package (Tr. 407). Following Foddrell's arraignment on the instant charges, Foddrell told Agent Hayward that he knew he was going to be arrested because he had heard that "Teddy" [Theodis] Williams had testified in the grand jury a few months previously (Tr. 310, 400-09, 416).

ARGUMENT

POINT I

The District Court Properly Refused to Recuse Itself.

Foddrell argues, for the first time on appeal, that Judge Gagliardi should have recused himself because he had seen the pre-sentence report on Foddrell before sentencing him on a plea of guilty to the conspiracy charged in Indictment 73 Cr. 229. This issue was not raised in the District Court and, is, in any event, frivolous.

At a pre-trial conference in the present case, counsel for Byrd made a motion two days before trial that Judge Gagliardi disqualify himself because he had presided over an 11-day hearing of wiretap evidence, much of which involved the narcotics activities of Foddrell, Byrd, Thomas

and numerous co-conspirators.* Counsel for Thomas made a similar motion on the apparent ground that Judge Gagliardi had presided when Foddrell and Thomas pleaded guilty and because he had heard Thomas' motion, and had ruled on appellant's motion, to reduce their sentences. Neither counsel mentioned any review by Judge Gagliardi of pre-sentence reports and counsel for Foddrell did not join in the motion. (C. 5-6). Foddrell's contention now that the judge should have recused himself—in the absence of a motion by him or an affidavit of any party below—may not now be heard. *Galella* v. *Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

Furthermore, even if Foddrell's present contention were deemed to have been preserved by the motions of his co-defendants below, none of the attorneys complied with the specific mandate of 28 U.S.C. § 144 that a "timely and sufficient affidavit" that the trial judge "has a personal bias or prejudice" be filed "setting forth the facts and the reasons for the belief that bias or prejudice exists" and that it be "accompanied by a certificate of counsel of record stating that it is made in good faith"** *United States* v. *Diorio*, 451 F.2d 21, 24 (2d Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *United States* v. *Bowles*, 428 F.2d 592, 594 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

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* *United States* v. *Barmore*, 73 Cr. 229, ultimately did not proceed to trial because certain defendants, including Foddrell and Thomas, pleaded guilty, and orders of *nolle prosequi* were entered as to others, including Byrd (C. 6, 8, 9). No ruling was made by the Court as "minimization" of the eavesdropping (C. 9).

** Indeed, indications of good faith are contradicted by counsel for Byrd ("I am only making this motion because I am assigned and I must protect the record") and by counsel for Thomas ("I am throwing it in—") (C. 5-6). *United States* v. *Diorio*, *supra*, 451 F.2d at 24 (... [T]here is no indication that the issue was seriously pressed below....").

Finally, there is no bias or prejudice of the trial judge shown as a result of having presided over the prior wiretap hearing and guilty pleas. Nowhere is there shown "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U.S. 22, 33-34 (1921); *United States* v. *Tropiano*, 418 F.2d 1069, 1077 (2d Cir. 1969), *cert. denied* as *Grasso* v. *United States*, 397 U.S. 1021 (1970). The mere fact that the judge became familiar with Foddrell's prior record does not "automatically or inferentially raise an issue of bias." *United States* v. *Tropiano*, *supra*, 418 F.2d at 1077. Judge Gagliardi's likening of his prior familiarity with Foddrell to a pre-trial suppression hearing (C. 5) is particularly apt, since there was no trial of the prior indictment (H. 21-22).

In any event, the jury, and not the judge, was the trier of fact below, and there is nothing in the record which even remotely suggests that the judge's actions, reactions, or statements improperly influenced or misled the jury. *United States* v. *Bowles*, *supra*, 428 F.2d at 594; *United States* v. *Diorio*, *supra*, 451 F.2d at 24.

Foddrell's reliance on *Gregg* v. *United States*, 394 U.S. 489 (1969) is misplaced. *Gregg* concerned an alleged violation of the specific mandate of Rule 32 of the Federal Rules of Criminal Procedure in that the trial judge was said to have received the pre-sentence report after the jury was charged but before it returned a verdict. The Supreme Court specifically noted that the pre-sentence report was essentially a condensation of the psychiatric report, and it found no unfairness that the psychiatric report contained the identical information as the pre-sentence report. 394 U.S. 489, 494; See also *United States* v. *Bowles*, *supra*, 428 F.2d at 594 n. 4.

Moreover, the law of this Circuit is clear that trial judges have a duty not to recuse themselves when, as here, there is an insufficient basis for so doing. *Rosen* v. *Sugarman*,

357 F.2d 794, 797-98 (2d Cir. 1966); *United States* v. *Tropiano, supra; United States* v. *Diorio, supra.**

POINT II

The District Court Properly Denied The Motion For a Hearing on Eavesdropping Conduct in a Separate Investigation.

Foddrell argues that this Court should remand this case to the District Court for a hearing to determine the legality of wiretaps conducted in a different investigation and fully explored at a previous hearing in which appellant participated. This contention is without merit.

Foddrell moved prior to trial below for an "order directing the United States Attorney for the Southern District of New York to disclose whether or not, in connection with this case, there has been electronic eavesdropping or wiretapping" directed at Foddrell or during which Foddrell was overheard.** Assistant United States Attorney Thomas E. Engel answered the motion on the record in open court at the pre-trial conference by representing to the Court that no information obtained from wiretapping or electronic eavesdropping led to any information with respect to Indictment 73 Cr. 869 (C. 19). The Government further represented that no evidence resulting from electronic surveillance would be introduced by the Government in its direct

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* Obviously, Foddrell may not avail himself of the view expressed in *United States* v. *Simon*, 393 F.2d 90, 91 (2d Cir. 1968) that retrials might wisely be assigned to a different trial judge. Here there were different charges against the same defendants and there were no special circumstances which would vitiate the otherwise desirable goals of having the same judge try separate cases involving the same co-conspirators, *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968); *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971).

** Judge Tenney had told counsel to proceed informally with discovery but this arrangement had been impossible because Foddrell's counsel had been out of the country for a long period of time (C. 14-15).

case and that any evidence it did have would only be used for purposes of cross-examination and rebuttal if the defendants took the stand, citing *Harris* v. *New York*, 401 U.S. 222 (1971) (C. 18-19; H. 27). Foddrell does not now claim that any such evidence, or the fruit of such evidence, was introduced below.

Foddrell's present claim is that the Government's response was insufficient and that the District Court should have directed a hearing to determine whether there was any electronic surveillance which led to the indictment, and, if so, to determine whether this surveillance was lawful. The record shows clearly, however, that there had been an extensive hearing conducted by the District Court in *United States* v. *Barmore*, 73 Cr. 229, and this record, totalling 1062 pages and lasting 10 days between April 5 and 24, 1973 was a matter of public record and on file in the District Court (C. 3, 5, 8, 10-11). Despite the availability of the minutes of the hearing, Foddrell made no showing to the District Court that the Government's evidence came in any way from the wiretaps in the unrelated case. Likewise, Foddrell's counsel below apparently made no effort to get the transcripts of the wiretaps from Foddrell's prior counsel or from the United States Attorney's office.

Furthermore, although counsel for Foddrell did not appear in the earlier proceedings, counsel for both Byrd and Thomas had been present as had the defendant Foddrell himself (C. 3, 5, 9-10; H. 26). Despite the familiarity of co-counsel with the wiretap surveillance and the fact that the record of the *Barmore* minimization hearing was public, Foddrell was unable to point to any possible lead which resulted in the indictment below and is unable now to present

instances of derivative use of the wiretaps in the trial below. Moreover, it is clear from the record of this case that Agent Hammonds *first* identified the men with whom he had dealt, Byrd and Foddrell, on May 13, 1973. Agents of the New York Joint Task Force had testified at the prior wiretap hearing that they heard Foddrell's voice on the telephone, during numerous telephone conversations during 1972. (C. 10; H. 26, 48, 53). If Agent Hammonds had received information gathered by the Task Force wiretap, surely it would be expected that he would have identified appellant long before May 13, 1973. In the context of this case, therefore, Foddrell does not allege any undisclosed electronic surveillance and cannot show any exploitation by the Government of any wiretap, unlawful or otherwise. 18 U.S.C. § 3504. In sum, there is no need for a hearing.

POINT III

The Denial of the Motion for a Severance was a Sound Exercise of the Trial Court's Discretion.

Foddrell argues that the trial judge erred in not granting a severance to him after counsel for Byrd indicated in his opening statement to the jury that his client would take the stand in his own defense and that Byrd's association with Foddrell raised "no inference of any criminality on his [Byrd's] part" (Tr. 16). The record below and the applicable law support the correctness of the decision denying the severance motion.

Foddrell's claim of prejudice on appeal is that Byrd's counsel in his opening statement indicated that his client was a general factotum for Foddrell, but that that association between the defendants should raise no inference of guilt on Byrd's part. Foddrell argues that this statement was so damaging in and of itself that a severance should have been granted and further that Byrd's later failure to

take the stand deprived him of his Sixth Amendment right of confrontation.

At the trial below Foddrell moved for a severance based on Byrd's opening statement, but grounded the motion on his surprise that Byrd would take the stand and on some remarks, and inferences which might be drawn therefrom, elliptically corroborative of the proof the Government had projected in its opening statement Tr. 16, 135).* The motion was not renewed when Byrd's counsel announced his client would not take the stand even though he had advised him to do so (Tr. 422). The claims of prejudice now asserted were thus not presented to the District Court below and cannot be deemed to have been raised by Foddrell's simple claim of surprise.

Motions for a severance are addressed to the sound discretion of the trial judge, and rulings will be disturbed on appeal only for clear abuses of discretion. Rule 14, F.R. Cr. P.; *United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir. 1975); *United States* v. *Jenkins*, 496 F.2d 57, 71 (2d Cir. 1974); *United States* v. *Peden*, 472 F.2d 583, 584 (2d Cir. 1972); *United States* v. *Calabro*, 467 F.2d 973, 987-88 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Cassino*, 467 F.2d 610, 622 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

The established rule in this Court is that a defendant

> "'must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one, and that a trial court's refusal to grant

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* Foddrell's counsel stated:

> That witness [Byrd] is going to take the stand and what I gathered today . . . this witness is going to admit being there. Prior to today my understanding was that he was not there (Tr. 135).

a severance will rarely be disturbed on review.'" *United States* v. *Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972), quoting *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971).

The claim that the oblique references to Foddrell in Byrd's opening statement caused substantial prejudice is speculative and remote, particularly in view of the trial court's charge that statements of counsel were not to be considered as evidence by the jury (Tr. 530) and that the evidence against each defendant was to be considered separately and distinctly (Tr. 535-36). *United States* v. *Catino*, 403 F.2d 491, 495 (2d Cir. 1968), *cert. denied* as *Pagano* v. *United States*, 394 U.S. 1003 (1969). The fact that Foddrell's defense was different from Byrd's is a difficulty not essentially different from those any defendant might suffer in a joint trial if the efforts of counsel are not coordinated. *United States* v. *Calabro, supra*, 467 F.2d 973, 988; *United States* v. *DeSapio*, 435 F.2d 272, 280-81 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). *Cf. United States* v. *Bentvena*, 319 F.2d 916, 930-32 (2d Cir.), *cert. denied* as *Mirra* v. *United States*, 375 U.S. 940 (1963).*

Finally, the fact that Byrd did not ultimately testify did not require a severance. Although a continuing duty exists to grant a severance where prejudice occurs, there is no credible showing here that Byrd's failure to testify as his counsel anticipated aggravated rather than cured what might have been a much more difficult problem for Foddrell—the admission of much of the Government's proof if Byrd had testified. In such a situation, the failure to renew

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* Appellant's contention that his rights under the Confrontation Clause were violated is frivolous since there was no evidence of Byrd's out-of-court statements concerning the matters of which Foddrell complained in Byrd's opening statement and thus no testimony, hearsay or otherwise, which Foddrell was prohibited from testing by cross-examination. *Bruton* v. *United States*, 391 U.S. 123 (1968).

the objection must be deemed a waiver of the objection in the light of the changed circumstances.*

POINT IV

The Prosecutor's Summation Was Proper.

Foddrell complains that the prosecutor made three improper remarks and thus deprived him of a fair trial. This contention is groundless.

The remark that the record of the case could be read in the jury room, instead of the *courtroom,* was an evident slip of the tongue and easily subject to correction if counsel had raised the matter at trial (Tr. 504). *Posey* v. *United States,* 416 F.2d 545, 552-553 (5th Cir. 1969), *cert. denied,* 397 U.S. 946 (1970); *United States* v. *Fortney,* 399 F.2d 406, 408 (3d Cir. 1968); *Cf. United States* v. *Rosa,* 493 F.2d 1191, 1195 (2d Cir. 1974). No objection was taken, and given the innocuousness of the slip, there is no reason objection should have been made. The jury evidently was not confused by this *lapsus linguae* because they asked to have the testimony read to them, rather than to have the transcript sent to the jury room (Tr. 561-62; GX 1).

Foddrell also complains that the Assistant United States Attorney vouched for the credibility of the accomplice witness Williams and improperly injected the prestige of his office into the proceedings below. The challenged remarks do not on their face support this contention.

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* Moreover, there was no objection to the remarks of Byrd's counsel at the time they were made, nor was any specific limiting instruction sought as to the remarks either at that time or later. Nor was any request made by Foddrell that the remarks be clarified in light of the failure of Byrd to testify. *Cf. United States* v. *Abrams,* 357 F.2d 539, 550-51 (2d Cir. 1966).

The reference to the heroin as "poison" (Tr. 514) is suitable comment about a drug the physiological effects of which can be literally lethal, *Blefare* v. *United States*, 362 F.2d 870, 878 (9th Cir. 1966) ("lethal poison"), and the sociological consequences of which are figuratively toxic. Morphine, and its derivatives, have been characterized as "poison" at least as far back as Mr. Justice Holmes' opinion in *Casey* v. *United States*, 276 U.S. 413, 418 (1927). *Cf. Jones* v. *United States*, 377 F.2d 742, 744 (8th Cir.), *cert. denied*, 389 U.S. 885 (1967); *Watson* v. *United States*, 439 F.2d 442, 472 n. 44 (D.C. Cir. 1970) (*en banc*).

As this Court stated in *United States* v. *Ramos*, 268 F.2d 878, 880 (2d Cir. 1959), where the prosecutor, among other things, referred to the purchase of three ounces of heroin as "representing $1,265 worth of human degradation":

> "[W]e think it not improper for Government counsel in the prosecution of such a case, at least within reasonable limitations, to emphasize the importance of the case by calling attention to the unsavory nature and the social consequences of illicit traffic in narcotics—consequences far more serious than those flowing, for instance, from illicit traffic in lottery tickets or in untaxed liquor."

Here, as in *Ramos*, the defense fully conceded the pernicious effects of heroin. Counsel for Foddrell told the jury in his summation that ". . . this case is about narcotics, heroin, and there is no one in this courtroom that can say anything good about narcotics or heroin." (Tr. 483).

Furthermore, since no objection was made to the prosecutor's description of the drug, appellant is precluded from raising the issue on appeal. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

In any event, the remarks in summation below, when placed, as they must be, in the context of the trial, *United States* v. *Bivona*, 487 F.2d 443, 447 (2d Cir. 1973), were clearly within the sanctioned "give-and-take" of summation. *Cf. United States* v. *Santana*, 485 F.2d 365, 371 (2d Cir. 1973).

POINT V

There is no Merit to the Claim of Prejudicial Pre-Indictment Delay.

Foddrell's final argument is that the trial court should have dismissed the indictment on the ground that the 15-month period between the date of the offense and the date of the indictment constituted prejudicial pre-indictment delay. This contention is contrary to the applicable law and the facts of this case.

In *United States* v. *Marion*, 404 U.S. 307 (1971), the Supreme Court held that the Due Process Clause of the Fifth Amendment protects a defendant against unreasonable pre-indictment delay if he can establish that the delay prejudiced his right to a fair trial and resulted from prosecutorial misconduct designed to harass or to gain some tactical advantage against him. As this Court's most recent pronouncement on this issue makes clear, *United States* v. *Brown*, Dkt. No. 74-1947 (2d Cir. February 20, 1975), slip op. 1847, both *prejudice and prosecutorial misconduct* must be proven in order to make out a successful claim under the Due Process Clause:

> "There is a surprising amount of discussion in numerous opinions of various Courts of Appeals in the federal judicial system relating to what might some day be proved or even plausibly alleged by a defendant in a criminal case to justify the dismissal of an indictment for prosecutorial misconduct in failing promptly to seek an indictment. That there must

be some such showing in the mandate of *United States* v. *Marion*, 404 U.S. 307, 325 (1971). Here the record is completely bare as to prejudice to the appellant and as to prosecutorial misconduct. The motion for a hearing was properly denied." *Id.* at 1850-51.

Claims of prejudicial pre-indictment delay, some possessing far more apparent substance than the one presented here, have been repeatedly rejected by this Court. See, *e.g.*, *United States* v. *Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972) (two month-delay); *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (approximately four-year delay); *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972) (four year, 11 month delay); *United States* v. *Schwartz*, 464 F.2d 499, 503-04 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972) (four and a half year delay); *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 22 (March 25, 1975) (13 month and 18 month delays); *United States* v. *Brown*, *supra* (17 month delay).*

The motion to dismiss the indictment was originally made before the Hon. Charles H. Tenney, United States District Judge, and was denied by him in a careful opinion

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* The principles underlying *Marion* were applied by this Court before *Marion* in rejecting similar claims. See, *United States* v. *Simmons*, 338 F.2d 804, 806-7 (2d Cir. 1974), *cert. denied*, 380 U.S. 983 (1965) (11 month delay); *United States* v. *Wilson*, 342 F.2d 782, 783 (2d Cir.), *cert. denied*, 382 U.S. 860 (1965) (four and a half month delay); *United States* v. *Hammond*, 360 F.2d 688, 689 (2d Cir.), *cert. denied*, 388 U.S. 918 (1966) (15 month delay); *United States* v. *Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968) (four year, 11 month delay); *United States* v. *Capaldo*, 402 F.2d 821 (2d Cir.), *cert. denied*, 394 U.S. 989 (1968) (three year, four month delay); *United States* v. *Parrott*, 425 F.2d 972, 976 (2d Cir. 1970) (three year delay).

dated April 25, 1974. Defendants alleged that, as a result of the pre-indictment delay, they were deprived (1) of the possibility of parole or trustee status in connection with the sentences imposed pursuant to their pleas of guilty in 73 Cr. 229, and (2) of the possibility of being sentenced concurrently for the crimes alleged in the two indictments.*

Judge Tenney held, in pertinent part:

> "Neither of these contentions, however, demonstrates the actual prejudice which is required for the Court to find that defendants' due process rights have been violated. Defendants can only speculate that they would have received concurrent sentences had they pleaded guilty to both the instant offense and those charged in 73 Cr. 229. Furthermore, if, as defendants claim, the instant indictment charges offenses which were contemporaneous with those previously admitted, there still remains the possibility that the sentencing judge will order any sentence rendered herein to run concurrently with the previous sentence. Defendants' claims with regard to parole and trustee status are similarly defective. The moving papers do not in any way suggest that defendants would be granted such status if the instant indictment had not been filed." **

Judge Tenney explicitly left open the question whether defendants could show prejudice to the preparation of their defenses for trial. Accordingly, a hearing was held just prior to trial when counsel for Thomas renewed his motion (C. 3-5, 7-8, 12-13). Foddrell did not join in the motion

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* The defendant Thomas was sentenced to a term of three years imprisonment in 73 Cr. 229 on June 11, 1973.

** Foddrell was, in fact, sentenced to a term to run concurrently with that imposed in 73 Cr. 229. *See, supra,* at 2.

below requesting only a hearing on the voluntariness of Foddrell's statements to the agents (C. 21).*

At the hearing, Assistant United States Attorney James E. Nesland, whose affidavit had been submitted in opposition to Foddrell's motion before Judge Tenney, testified as to the facts and circumstances behind his affidavit, particularly his statement therein that the agents' investigating the case did not identify Foddrell and the others as the men involved until a year after the offense occurred (C. 7-8; H. 7).

Hammonds had identified Byrd and Foddrell from photographs in an office of Drug Abuse and Law Enforcement in May of 1973 and then showed the pictures to Williams the following month who identified the same pictures as Hammonds had and, in addition, identified Thomas as the man who transferred the heroin to him the year before, a fact theretofore unknown to Hammonds (H. 8-9, 12-14, 36-43, 48-49, 53-55, 58, 60, 76, 91-94, 109-112, 115, 119, 158-62, 166-67, 173-74, 181, 186; Tr. 167-68, 213, 330-31, 358-60, 388).

The court below denied the motion and found that the Government had not brought the indictment earlier because of "admirable restraint" in not proceeding until the defendants had positively been identified, that there had been no constitutional violations by the Government, and that the sheer loss of memory complained of by the defendant Thomas was not a sufficient showing of prejudice (H. 24-25, 27).**

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* Foddrell previously had moved to dismiss the indictment, but did not cite delay as grounds therefor (A. 8).

** The alleged dimming of Thomas' recollection, even if the claim is construed as having been adopted by Foddrell, does not rise to the constitutional dimensions of the "specific prejudice" required by *Marion*. *United States* v. *Ferrara, supra,* 458 F.2d at 875; *United States* v. *Briggs, supra,* 457 F.2d at 911; *United States* v. *Parrott, supra,* 425 F.2d at 976; *United States* v. *Hammond, supra,* 360 F.2d at 689.

The Court's decision is amply supported by the cases. Similar considerations were found by this Court in *United States* v. *Feinberg, supra,* to justify the conclusion that strict judicial scrutiny of pre-arrest policies by law enforcement agencies would be unwise:

> "Acceptance of the proposition advanced by appellant [judicial scrutiny of pre-arrest policies] would encourage hasty, less efficient investigation and premature deprivations of freedom, curtail the investigation of organized crime, and lodge with enforcement agents the procedural onus of record in detail every event in the investigative process. In short, fear of forfeiting a prosecution would frequently induce unreasonable speed which would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. *United States* v. *Ewell,* 383 U.S. 116 at 120 (1964)." 383 F.2d at 67.

Similarly, in *United States* v. *DeMasi,* 445 F.2d 251, 255 (2d Cir.), *cert. denied,* 404 U.S. 882 (1971), this Court stated:

> ". . . [C]areful investigation, even at the price of delay, is to be cherished inasmuch 'time-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons'. *United States* v. *Feinberg, supra* at 64-65."

The record here plainly establishes that the fifteen-month delay between offense and indictment was attributable solely to legitimate law enforcement considerations.

CONCLUSION

The judment of conviction should be affirmed.

Respectfully submitted,

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